12

FILE COPY

Office Supreme Court,
FILED
JAN 28 193
CHARLES ELMORE CRO

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs. No. 344

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Appellees.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Cross-Appellants,

vs. No. 345

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS TO ADDITIONAL BRIEF OF ATLANTIC COAST LINE RAILROAD COMPANY

HENRY P. ADAIR,
AUGUST G. GUTHEIM,
R. A. BAKER,
C. G. ASHBY,
Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company.

CARY D. LANDIS,
Attorney General of the State of Florida.
THEO. T. TURNBULL,
Special Counsel for Florida Railroad Commission.
J. V. NORMAN,
Counsel for Wilson Lumber Company of Florida.

SUBJECT INDEX

Page

The Scope of the Authority of the Interstate Commerce Commission in Dealing With Intrastate Rates 2

The Railroad Company Cannot Be Heard to Say that the State Rate was Effectively Interdicted until After the End of the Restitution Period. No Application was Made by the Railroad Company to the Federal Administrative Authority until March, 1931, After the Coming Down of the Mandates in this Cause. No Application was Ever Made to State Administrative Authority at any Time 4

This Proceeding is Not One for Reparations, But One for Restitution 6

Conclusion 8

TABLE OF CASES

	Page
Arkadelphia Milling Co. v. St. Louis, S. W. Ry., 249 U. S. 134	7
B. & O. Ry. Co. v. United States, 43 F. (2d) 603 (affirmed, 284 U. S. 195)	3
B. & O. Ry. Co. v. United States, 279 U. S. 781	7, 8
Board of Commrs. of N. D. v. Great Northern Ry. Co. 281 U. S. 412	4
Ex Parte Lincoln Gas & Elec. Co. 256 U. S. 512	7
Ex Parte Lincoln Gas & Elec. Co. 257 U. S. 6	7
Florida v. United States, 282 U. S. 194	2, 3
Gilchrist v. Interboro R. T. Co. 279 U. S. 159	6
L. & N. R. Co. v. Speed-Parker, 103 Fla. 724, 137 So. 724	5
Northwestern Fuel Co. v. Brock, 139 U. S. 216	7
Western & Atl. R. Co. v. Georgia P. S. Com. 267 U. S. 493	5

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1934

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellant,

vs.

No. 344

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Appellees.

STATE OF FLORIDA and E. S. MATTHEWS, MAMIE EATON-GREENE, and W. B. DOUGLASS, ETC., et al.,

Cross-Appellants,

vs.

No. 345

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Cross-Appellees.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS TO ADDITIONAL BRIEF OF ATLANTIC COAST LINE RAILROAD COMPANY

At the conclusion of the argument in the above case the Atlantic Coast Line Railroad Company obtained permission to file an additional brief upon "the power of the Interstate Commerce Commission." The additional brief, the theme of which is that the claimants in these restitution proceedings should have first resorted to the Interstate Commerce Commission, has been filed by the Railroad Company.

We think that the Railroad Company's additional brief is answered generally by our main brief at **POINT 8** (pp. 123-127) and by **POINT X** of our supplemental brief (pp. 50-64). But we here set out briefly a few general principles which we think are controlling upon this aspect of the Railroad Company's contention.

The Scope of the Authority of the Interstate Commerce Commission in Dealing with Intrastate Rates.

The power of the Interstate Commerce Commission to prescribe intrastate rates arises out of Sections 13 (3) and 13 (4) of the Interstate Commerce Act (Appendix 2, Main Brief, pp. 153-4).

It cannot intermeddle with state rates at all until it makes "the basic or essential findings" found lacking by this Court in the order of the Commission stricken down when this case was formerly before this Court (*Florida* v. *United States*, 282 U. S. 194, text 215).

And even then its power is limited to prescribing "the rate thereafter to be charged" (Section 13 (4), Main Brief, p. 154).

In *Florida* v. *United States* (supra), this Court held that

> "The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates".

And whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear (*Florida* v. *United States*, supra, text 211, 212).

Upon the going down of the mandates of this Court striking down the order of the Interstate Commerce Commission, of August 2nd, 1928, as amended, for want of basic or essential findings, that order became *functus officio*. There were no basic or essential findings and no valid order until that of July 5, 1932.

And those findings spoke only in presenti and in futuro, (p. 203 of Exhibits) and the order dealt only with the future. (Supplemental Brief, Appendix B, p. 67).

If the Commission had attempted to make it applicable retroactively it would have been void:

Baltimore & Ohio R. Co. v. *United States*,
43 Fed. (2d) 603; affirmed, 284 U. S. 195.

And this Court has held that it was not the purpose of Congress to interdict a state rate lawfully established for transportation exclusively intrastate, *before* appropriate action by the Interstate Commerce Commission:

Board of Commissioners v. *Great Northern R. Co.*, 281 U. S. 412.

The Railroad Company Cannot Be Heard to Say that the State Rate was Effectively Interdicted until After the End of the Restitution Period. No Application was Made by the Railroad Company to the Federal Administrative Authority until March, 1931, After the Coming Down of the Mandates in this Cause. No Application was Ever Made to State Administrative Authority at Any Time.

In the original proceedings before the Interstate Commerce Commission the Railroad Company denied that there was or had been any violation on its part of the Interstate Commerce Act (Former Record p. 200).

In those proceedings it made no attack upon the intrastate rate (Former Record, p. 495-496). Its first application to the Federal administrative authority was in March, 1931, after the end of the restitution period (Supplemental Brief, p. 58).

Although the State rate had been in effect since 1904 in intrastate commerce over some of its Florida lines, for trainload application, and over all of its Florida lines since 1914 for carload application, the Railroad Company has never made application to State administrative authority

to change that rate (R. 23). And this Court in this case (Florida v. United States, supra) has held that the reasonableness of the intrastate rate *per se* lies with the State authority and not with the (Federal) Commission.

By the terms of Special Rule 1 of the Florida Railroad Commission (afterwards re-numbered Rule 16) (pp. 1-3, Exhibits) adopted January 27th, 1927, after hearing consequent upon notice, all rates, practices, etc., whether voluntarily established or otherwise, were established as the rates, etc. of the Florida Railroad Commission, and any alteration of them without application to the Florida Commission was prohibited.

And no change in such rates, whether voluntary or otherwise, can be made except after a hearing consequent upon notice to the carriers and all parties interested (Section 6722, Compiled General Laws of Florida, 1927, Supplemental Brief, Appendix A).

A rule almost identical in scope with Rule 16 was sustained by this Court in

Western & Atlantic R. R. Company, v.
Georgia Public Service Commission,
267 U. S. 493.

And the Florida rule was molded upon that decision shortly after that opinion was handed down.

The effect of such rates upon the carrier is shown in,

L. & N. R. Co. v. *Speed-Parker Co.*,
103 Fla. 724, 137 So. 724 (1931).

The duty to apply to administrative authority lay with the Railroad Company and not with the claimants.

And orderly action cannot be defeated by alleging an intent on the part of the administrative body to deny the relief sought:

Gilchrist v. *Interboro Rapid Transit Co.*,
279 U. S. 159.

This Proceeding is Not one for Reparations, but One for Restitution.

The Railroad Company infers at page 14 of its additional brief and elsewhere that this proceeding is one prosecuted by the claimants against the Railroad Company for a violation of the Interstate Commerce Act. And so, it says, the principles laid down by this Court in construing Sections 9, 13 (1) and 16 (1) of the Interstate Commerce Act (Appendix C, p. 70, Supplemental Brief) are controlling here.

We have already analyzed and considered most if not all of these cases under Point X (p. 50, et seq. of our Supplemental Brief).

They all deal largely with suits for overcharges in *interstate* charges. The causes of action there asserted are founded upon the Interstate Commerce Act and the claims are unliquidated. The several claims here are not unliquidated. It was not disputed at the bar that if the District Court had rendered the right decree in the first instance the State rate would have been the measure of charge during the restitution period unless the Railroad

Company had taken some action in a proper forum to displace it.

But the fundamental difference is that these proceedings are not founded upon the Interstate Commerce Act or to enforce a cause of action for a violation of it. On the contrary, it is an action upon the mandates of this Court for restitution and for the restoration to the claimants of the things which they lost by reason of the failure of the District Court to enter the right decree in the first instance.

The jurisdiction is one which is inherent in every court to right the wrongs which have resulted through the entry of the wrong decree afterwards reversed.

The cases are clear as to the inherent power and jurisdiction to perform it:

Northwestern Fuel Company v. *Brock*,
139 U. S. 216.

Arkadelphia Milling Co. v. *St. L. & S. W. Ry. Co.*, 249 U. S. 134.

Ex Parte Lincoln Gas & Electric Co.,
256 U. S. 512 (S. C.) 257 U. S. 6.

B. & O. R. Co. v. *United States*, 279 U. S. 781.

In one of the cases cited above (*B. & O. R. Co.* v. *United States*) the appellees made almost the identical assertion made by the Railroad Company in this case, viz., that preliminary resort must be made to the Interstate Commerce Commission. In the appellees' reply to the ap-

pellant's Statement of Jurisdiction the point was made as follows:

> "For the court below to have issued a writ of restitution would be for that court to have undertaken to determine which lines should pay the bridge toll at St. Louis, Missouri. This question is a matter peculiarly for the Interstate Commerce Commission (Terminal Railroad Association v. United States, 266 U. S. 17).
>
> "If the east-side lines, appellants here, have suffered any damages by reason of complying with an order of the Interstate Commerce Commission, their remedy lies in a proceeding before the Commission, and if they have sustained any damages for which the law allows a recovery in any other forum, they are relegated to an action at law".

This Court brushed aside all these contentions and ordered restitution to be made.

CONCLUSION

To hold that these claimants should seek their restitution before the Interstate Commerce Commission would not only confuse restitution with reparation and confer upon that Commission a jurisdiction which it has not and has never even purported to exercise, but would render nugatory the action of this Court in reversing the decrees of the District Court and the order of the District Court in an-

nulling and setting aside the order of the Interstate Commerce Commission. So likewise rendered nugatory by such holding would be the action of this Court in denying the motion of the Railroad Company made in this Court to stay the issuance of the mandates of this Court.

Respectfully submitted,

CARY D. LANDIS,
Attorney General of the State of Florida.
THEO. T. TURNBULL,
Special Counsel for Florida Railroad Commission.
J. V. NORMAN,
Counsel for Wilson Lumber Company of Florida.
HENRY P. ADAIR,
AUGUST G. GUTHEIM,
R. A. BAKER,
C. G. ASHBY,
Counsel for Brooks-Scanlon Corporation, Wilson Cypress Company.